Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232
	)	

COMMENTS OF UNITED COMMUNICATIONS CORPORATION

United Communications Corporation ("UCC"), by its attorneys, submits these Comments in response to the Notice of Proposed Rulemaking in the captioned docket. There, the FCC proposes to require licensees to record most (or even all) of their programming as a means of facilitating agency enforcement of the rules restricting obscene, indecent or profane broadcasts. Although UCC sympathizes with the Commission's resolve to refine its administration of the indecency rules, the proposal set forth in the NPRM is wholly inappropriate.

I. Background

UCC Radio Company is the licensee of small market television stations KEYC-TV, Mankato, Minnesota and WWNY-TV, Carthage, New York, as well as low power / Class A television stations K19CA, St. James, Minnesota and WNYF, Watertown/Massena, New York. These are among the smallest television markets in the country. Nevertheless, the stations are noted for their commitment to local service. As a result of the quality of their broadcast product, their local new programs, for example, attract audience shares that are truly exceptional in this age of multiple viewing options.

II. Analytical Framework

When an evocative issue such as the regulation of indecent programming is under review – especially when, as here, it has been put into play by highly publicized Congressional furor – there is an understandable tendency for agencies to react in a dramatic and sometimes sweeping fashion. The public interest, however, is a complex of interdependent variables. Regulations contemplated in order to resolve one factual context can effect other critical aspects of the public interest not directly under review. Thus, while decisiveness can be a virtue, a show of action should not proceed without attention to the ramifying effects the proposed regulation will have.

Ensuring that the public interest is properly served requires explicit recognition of the variety of interests that a particular proceeding implicates, and then consideration of the extent to which a proposed rule affects the public interest in its broader contours. This dynamic is the reason that the economic cost of regulation should nearly always play a key role in settling on the final form of new rules. This is especially important where small businesses are concerned. If a regulation is too burdensome in terms of the economic cost entailed by compliance, it can adversely affect the ability to provide services deemed vital to the public interest in other ways. For instance, in the broadcast context, the provision of local programming (including news and emergency information) is a service that the FCC recognizes as quintessentially in the public interest. Yet, such services entail hefty expense outlays. To the extent that the FCC mandates additional costs, the operator often has no choice but to subtract that cost from other areas of the operating budget such as local origination.

Notably, in one of the markets served by UCC, its main competitor has been forced by the exigencies of market economics to discontinue the local origination of news programming.

The imposition of additional regulatory burdens will only force more marginal stations to curtail service in like fashion.

The regulatory dynamics described above can produce irrational results when an industry-wide regulation is imposed in reaction to the behavior of only a small fraction of the industry's participants. In that case, the regulation is objectionable not only because it will undermine other variables affecting the public interest, but also because its over-breadth is a sure sign that it has not been carefully enough crafted.

In a related sense, the integrity of the regulatory process itself requires that a new rule be a fair and principled response to the events in the external business environment that triggered the rule making in the first place. Among other things, this means that regulations designed to control proscribed behavior must be directed to the actual source of the malady. The issue here is not merely a matter of over-breadth, but one of ascribing blame and liability where the infraction originates, rather than on the innocent. This is important whether the innocent parties harmed form a universe of one or of thousands.

As shown below, the rule as proposed in the NPRM is objectionable because it succumbs to precisely these dangers.

III. The Proposed Rule Would Harm Broadcasters Who Are Not Offenders

Imposing additional regulatory burdens on small broadcast operations such as those of UCC can only detract from their ability to continue providing vital service to the local community.

The proposed mandate would require the Company to acquire a recording device, archive media and a greatly expanded storage capacity. Moreover, the proposed new recording and record-keeping requirements would be labor intensive. Thus, the personnel resources that would

have to be devoted to the increased recording and record keeping activities required by the proposed rule would be even more burdensome than the capital expenditures involved.

Significantly, equipment reliability would become an issue if the FCC adopts this proposed change, and especially if 24 hour recording is required. If the stations are unattended, the failure of a recording device will not be discoverable. Thus, to prevent gaps in any required archive, broadcasters would be compelled to devote staff to monitoring the recording device around the clock.

Small operations, and especially those such as those of UCC that serve audiences in more rural sections of the nation where indecency is still viewed with opprobrium, have no incentive to broadcast indecent material. The cost of compliance with these new regulations is therefore disproportionate to any public benefit that the FCC is attempting to safeguard here. Indeed, the cost involved outweighs any benefit whatsoever.

IV. The Proposed Rule is Overbroad

The proposed rule is manifestly overbroad. The rule would apply to all television, FM and AM facilities. As of December 31, 2003, 11,011 FM stations and AM radio stations were in operation.[1] In addition, there were 1,733 full power television stations in the Unites States, as well as 605 Class A stations and 2,129 low power television stations. The rule would thus affect nearly 4,500 television station licensees, as well as more than eleven thousand radio operations.[2]

Notwithstanding this substantial number of stations, only a very small percentage actually have indecency complaints lodged against them in the course of a given license term. The reason for this is quite simple: For the majority of broadcasters, their business case does not depend upon – and indeed would be undermined by – the transmission of programming that violates the

[1] FCC Public Notice, Broadcast Station Totals as of December 31, 2003 (rel. Feb. 24, 2004).
[2] *Id.*

Commission's indecency rules. To state this point in terms of the 'economic actor' model heavily employed by the Commission in its policy analyses, the majority of broadcasters are fundamentally *disincented* from airing programming that risks an indecency finding by the Commission.

We do not have statistics available that would quantify this point precisely, but the Commission has provided a clue at note 8 of the NPRM. There, the FCC says during the years from 2000 to 2002 (evidently inclusive), it received 14,379 complaints covering 598 programs. (Although the volume of complaints seems to have escalated dramatically in recent years as a function of the FCC's website and a few incidents that attracted national attention, the number of programs remains small).[3] This datum demonstrates that the problem is really a narrow one despite a large absolute number of complaints.

The Commission does not break this figure down between radio and television, but for the purpose of conservative analysis let us suppose all of the complaints were leveled against radio stations only. Assume, further, conservatively, that the typical radio station airs only six programs per day: If 11,011 radio stations aired six programs per day (times 365 days), the result would be that about 24 million programs would have been broadcast per year. Over the three years mentioned in note 8 (*i.e.*, 2000 through 2002), this would mean that the universe of programs was on the order of about 72 million programs. Of this, only 598 programs drew indecency complaints. That means that the proportion of programs drawing complaints is less than .001 percent.[4] A similar result applies if one assumes that all the complaints were against television stations. While the number of television stations is smaller, they typically run about 25 pro-

[3] Moreover, in none of the sensational cases was there an issue as to what was said or depicted in the broadcast.

[4] Note 8 is not clear as to whether the listed number of programs reflects the broadcast of a given network program over multiple stations. If not, the proportion of offending programs would be somewhat higher, but it still represents a very small proportion of the program universe.

grams in the average day. Either way, it appears that fewer than one program out of every ten thousand broadcast produced a complaint. Such a minuscule percentage forms an insufficient basis on which to require that all stations keep recordings of all or most of their broadcast day.

By contrast, a distinct minority of licensees have deployed revenue strategies that are furthered by indecent programming. It is this relatively small subset of licensees who draw the vast bulk of indecency complaints. For these licensees, the opposite economic dynamic is in play: They are affirmatively incented to transmit programming that risks allegations of indecency because that is the 'product' they are selling and the 'brand' that distinguishes them in the marketplace. FCC-imposed monetary forfeitures, when they have been levied at all, have been viewed by this subset of licensees as a mere cost of doing business. It is an unfortunate fact of the contemporary landscape that such a relatively small section of the broadcast industry has impelled the Commission to convene the instant proceeding. Sadly, the FCC proposal misses its mark not only in scope but also in purpose, as few complaints turn on a dispute as to what was said or shown in the broadcast. Evidently most complaints focus on network programs such as those of Howard Stern. The economics of network operation make the retention of recordings easily affordable at that level.

In this respect, we believe the tone and wording of the NPRM belie the real impetus of this proceeding. That impetus is not that the proposed rule would enhance enforcement "in order to improve adjudication of complaints." NPRM at ¶ 3. Rather, it is that a rule is necessary to improve the adjudication of a minority of complaints *lodged against a minority of licensees and a tiny fraction of all aired programming*. This is an important point because the absence of a genuinely objective characterization of the root causes for the proposed rule allows the NPRM to read as if indecency violations are an industry syndrome that calls for an industry-wide solution.

Because this is *not* the underlying industry reality, the Commission's regulatory response, which would affect all 15,000-plus stations in the country if it is adopted, is grotesquely overbroad.

V. An Alternative Approach is Preferable to the Proposed Rule

In other words, the FCC's perception of a need to strengthen its enforcement mechanisms is the result of the actions of an industry subset. We therefore propose that, if any change is made at all, the Commission fashion a rule that accords with that reality. A rule that is more narrowly tailored to address the actions of this much smaller class can be developed in a straightforward way. Under the FCC's current procedures, "[i]f there is sufficient information in the complaint that the facts, if true, suggest a violation may have occurred, the staff will commence an investigation by issuing a letter of inquiry that, among other things, requires the licensee to produce a recording or transcript of the program, if it has one. Otherwise, the complaint is generally dismissed or denied." NPRM at ¶ 5. Moreover, the Commission has held that where a licensee can neither confirm nor deny allegations of indecent broadcasts in a complaint, the broadcasts are deemed to have occurred. *See, e.g., Clear Channel Broadcasting Licensees, Inc*., 19 FCC Rcd 1768 (2004). For this reason, as the Commission notes in the NPRM, some broadcasters choose to "retain recordings on a voluntary basis." NPRM at ¶ 6.

The most the Commission should undertake would be to clarify this evidentiary dynamic as follows: If an otherwise credible complaint were lodged, the FCC could presume that the allegedly indecent material had in fact been broadcast, but this presumption could be rebutted by contrary evidence such as, but not limited to, a broadcaster's recordings. Rather than adding a further layer of burdensome FCC regulation, licensees, in effect, would conduct their own cost-benefit analyses. On one hand, broadcasters (such as the Company) who have never had an indecency complaint lodged against them, may decide that the incremental cost of retaining re-

cords for several months outweighs the probability that an indecency complaint will be filed and that a recording will be needed to defend against it. On the other hand, licensees whose business plans include pushing the limits of the indecency rules may decide that it is in their interest to retain recordings of their programming to protect themselves against the indecency charges that inevitably will be raised given the nature of their programming. To the extent that these licensees choose *not* to preserve recording precisely to cover the trail of their violations, the Commission would be able to rely on the presumption to overcome a deliberately obfuscatory strategy on the part of the licensee..

Under an alternative approach, the Commission could in effect reward licensees who have not had a credible indecency complaint lodged against them for some specified period of time, such as the eight years of a full license term, where the lack of a tape or other record of the broadcast was an issue. The Commission would exempt such licensees from any requirement to retain records of their programming. If a complaint were lodged, and if the substance of the alleged offending broadcast were disputed by the licensee, it would be the burden of the complainant to provide compelling evidence (a tape or transcript) that the allegations were true. Conversely, any licensee who broadcast indecent programming within the past, say, eight years would be required to retain program records as proposed in the NPRM, if the indecent broadcast was something other than a network program (*i.e.*, where a record of the program was not already available from the network. .

In essence, either of these approaches would improve the enforcement process by focusing the burden on those few stations that have produced the vast majority of enforcement complaints. The first plan described above would clarify the evidentiary rubric applicable to licensees who elect not to retain program records, and then leave the matter to market forces. We do

not believe that plan would present any serious threat of too many 'fuzzy' cases. As discussed earlier, the class of stations against which listeners or viewers will lodge indecency complaints is highly predictable. The probabilities on this score are by and large a function of the station's format and program lineup. One can predict with certainty, for instance, that a licensee who elects as a business judgment to air the "Howard Stern Show" will receive complaints. There is little mystery or unpredictability in the way such states of affairs play out. Stern notoriously disagrees with the concept of limiting indecent broadcasts, and will not stop flouting the mandate of Congress in this regard until it becomes uneconomical for him to do so.

VI. Balancing of Interests

One final point concerning the public interest is in order. In this case, one might be inclined to posit the interests of citizen-complainants on one side of the issue and the interests of licensees on the other. (For broadcasters, those interests include the cost and trouble of the recording and retention system, as well as the potential chilling effect imposed by such process on robust free speech.) One might then conclude, as the NPRM implies, that the former outweighs the latter. The problem with this approach, however, is that it simplistically characterizes the interests of all licensees (i.e., their interest in being free from unduly burdensome regulation) as being identical. This is not true. Licensees who, as an affirmative business strategy, air programming that can be expected to draw an indecency finding should not be viewed as having interests identical and of equal weight compared to those who perennially stay clear of indecency infractions. There is a valid sense in which the interests of rule-abiding broadcasters are superior to those who are non-compliant or who, by the nature of their programming strategy, continually risk

non-compliance. This being the case, a resolution which imposes the burden of retaining program recordings on the one group but not the other would be justifiable.

VII. The Proposed Rule is Unfair to Network Affiliates.

Finally, apart from the problem of over-breadth, the proposed rule is fundamentally unfair to network affiliates who have little control over the content of network programming. The Janet Jackson episode illustrates this point dramatically. In that case, the FCC ultimately rendered findings of indecency violations against scores of network affiliates who were as surprised and outraged at the stunt in questions as were millions of viewers. The proper allocation of liability in such cases should be to the networks themselves (or the licensees which are directly controlled by the networks), not law-abiding affiliates.

In that regard, the proposed mandate would be particularly burdensome to network affiliates insofar as it would be completely redundant. Not only do affiliates have limited control over the material that the network supplies, but it makes no sense to require every affiliate to record the same programming that every other affiliate of that network would also be required to record. This is also true with respect to syndicated programming. At the least, network affiliates and stations airing syndicated programming should only have to record what is locally produced, such as news and talk programs. The more far-reaching proposal would represent un unnecessary barrier to small broadcasters attempting to bring diversity to the industry. Such entities have to compete against stations and clusters of stations owned by large media conglomerates. They cannot be expected to continue to serve the public well while the FCC foists additional regulatory burdens on them. Small entities can little afford the costs associated with additional record-keeping requirements, but large competitors can absorb such costs with relative ease.

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For the foregoing reasons, United Communications Corporation urges the Commission to reject the proposal set forth in the NPRM. At most, the Commission should adopt a modified version which accommodates the various interests in play more fairly, and avoids the imposition of an unnecessary and onerous regulatory burden on the innocent.

Respectfully submitted

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